(2)

No. 466-468

FILED
NOV 15 1943
CHARLES ELMORE CROPL
CLER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

DANIEL S. GILLMOR, HENRY H. ABRAMS, AND PYRAMID COMMERCIAL CORPORATION, Suing on Its Own Behalf and on Behalf of All Other Owners and Holders of First Consolidated Mortgage 5% Gold Bonds, etc.,

Petitioners,

v.

THE INDIANAPOLIS GAS COMPANY AND CITY OF INDIANAPOLIS,

Respondents.

RESPONDENT INDIANAPOLIS GAS COMPANY'S BRIEF OPPOSING THE PETITION FOR A WRIT OF CERTIORAI IN EACH CASE

LOUIS B. EWBANK,
Attorney for Respondent
The Indianapolis Gas Company.

733 State Life Building,
Indianapolis, Indiana.

INDEX

TABLE OF CASES CITED

Abbreviation Used

"R." should be read: "Record, page ....."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

DANIEL S. GILLMOR, HENRY H. ABRAMS, AND PYRAMID COMMERCIAL CORPORATION, Suing on Its Own Behalf and on Behalf of All Other Owners and Holders of First Consolidated Mortgage 5% Gold Bonds, etc.,
Petitioners,

v.

THE INDIANAPOLIS GAS COMPANY AND CITY OF INDIANAPOLIS,
Respondents.

No. ———

RESPONDENT INDIANAPOLIS GAS COMPANY'S BRIEF OPPOSING THE PETITION FOR A WRIT OF CERTIORAI IN EACH CASE

Three appeals from identical judgments of the District Court in three actions at law which were consolidated for purposes of trial and were tried together, were all taken to the Circuit Court of Appeals for the Seventh Circuit on a single Record, where they were heard together, and where each Judgment was Affirmed (R. 421, 422, 423).

Only a single Petition and supporting Brief have been filed in this Supreme Court by all the Petitioners in their

combined cause, and Defendant-Appellee The Indianapolis Gas Company is filing this one Brief in opposition thereto.

The Opinion of the said Circuit Court of Appeals (R. 478 to 486) is reported in 136 Fed. (2d) 925 (Advance Sheets, September 13, 1943.)

CORRECTED STATEMENT OF THE FACTS

The Opinion of the Circuit Court of Appeals (R. 478-486, 136 Fed. (2d) 925) in these three causes, of which Petitioners now ask a review, sets out the facts in the three or four opening pages quite fully and accurately. But as many of these facts are not included in the Statement of the Case made by Petitioners on their pages 2 to 5, we call attention to facts they have omitted.

Each of the three suits was an action at law by one of the Petitioners to recover money alleged to be due on a private contract, as interest on mortgage bonds issued by this Respondent (R. 2; and 269; and 335). Jurisdiction was based in each case solely on alleged Diversity of Citizenship (*Ibid;* Findings No. 1 at each of R. 228, 329 and 393; Findings Nos. 2, 3 and 4, R. 228-229).

The Chase National Bank (of New York) is and long has been the successor and sole surviving Trustee for the bondholders under the Mortgage Deed of Trust that secured said bonds, which covered all of the property of this Respondent, a Gas Plant in Indianapolis. Citizens Gas Company had been organized to build and acquire a competing Gas Plant in Indianapolis, and was bound at a time and under conditions fixed by contracts to transfer its property to the City of Indianapolis as a Public Chari-

table Trust, but the two plants were in competition in large parts of their business.

In 1913 the Indianapolis Gas Company conveyed by way of lease for 99 years, all its Gas Plant property to Citizens Gas Company, which amalgamated the two plants and operated them as one until 1935, when it conveyed its own property to the City of Indianapolis and turned over to the City the two combined plants, which the City has since operated.

The lease (R. 108-137) had bound Citizens Gas Company to pay as rent all the obligations of the lessor, including these interest coupons as they should mature (R. 126-127), and at the expiration of the lease to restore and turn back the demised property in condition for separate use (R. 129-130). But when the City took them over it denied the power of Citizens Gas Company as "primary trustee" of a Public Charitable Trust to bind by such contracts its property or the successor trustee, and ceased to pay any rent; which left this Respondent without property or income. On March 2, 1936, these two Respondents executed a "stand-still" agreement which provided that beginning after April 1, 1936, all sums accruing to be paid under the terms of the lease should be paid to a bank, "in escrow" to await a determination, by litigation or agreement, as to any liability of the City under the lease or otherwise, and in what sum, if any (R. 235, 236, Findings 9, 11). On June 6, 1936, said Trustee, Chase National Bank, commenced an action to establish liability of the City under the lease and to recover from Respondent Indianapolis Gas Company on such of these interest coupons (held by assignors of Petitioners and others) as had then matured. The District Court decided the lease did

not bind the City, and the Circuit Court of Appeals held that it did (113 F. (2d) 217), and this Supreme Court adjudged there had been no jurisdiction (314 U. S. 63) and ordered the action dismissed (R. 235-236, Finding 12). In the meantime a suit raising similar questions had been commenced in 1937 in a State Court, which upon the dismissal of the Federal suit, began to draw nearer a trial (R. 236, Finding 13). In March, 1942, nobody had received any interest for six years (since April 1, 1936), the case involved questions on which the District Court and Circuit Court of Appeals had differed that had not been directly decided by a Court of last resort in Indiana, and expenses of more than $300,000 had been incurred in litigation. The mortgage debt consisted of $6,881,000 of bonds plus $2,064,300 of unpaid interest coupons (total $8,945,300), and if the property were taken back without being restored for separate operation as stipulated in the (contested) lease, it would cost $4,800,000 to separate the two plants and get the leased property in condition for separate operation, while this respondent Company had no money and no further credit, and the value of the property was less than $10,000,000. And any purchaser must operate the mortgaged plant in competition with the City, which for $2,500,000 could extend its plant to serve the entire city (R. 69, Stip.).

Under these difficulties the bonds were excluded from sale on the New York Curb Exchange in September, 1936, except as dealt in "flat" with all the defaulted interest coupons attached, maturing October 1, 1936, and thereafter, and the selling value was depressed.

Petitioners Gillmor and Abrams acquired their bonds at a heavy discount (R. 88), and even Pyramid Commercial Corporation, which did not buy until May 25, 1942,

after five-sixths of all the bonds had been surrendered and destroyed, bought at a discount of more than $3,000 (R. 89).

Each petitioner bought into this matter with "notice of (said) litigation affecting the bonds, and notice that the Gas Company" (this respondent) "was because of such litigation unable to pay the coupons as they respectively matured, and * * * notice of their dishonor" (R. 400-401, Stip. 2).

Besides "Article VII" the mortgage contained fourteen other Articles that fill ten printed pages (R. 303-313) of the record, besides six pages (R. 297-302) of general provisions; and in these there are repeated references to a "default that may have occurred and continued" for six months, and to the discretion of the trustees, and the "control of the holders of a majority in amount of said bonds" after such a default, with which Article VII had to be construed.

Copies of the Plan were sent to all the owners of bonds at that time, and these Counsel wrote to this respondent about it repeatedly more than a month before it was put in execution (R. 147-150, Exhibits No. 7, 9.) But Pyramid Commercial Corporation did not own any bonds until nearly four weeks after the Plan was executed (R. 394).

ARGUMENT

QUESTIONS PRESENTED

1. Whether or not this Court will call up a question as to the proper construction under the law of Indiana of the provisions of a private contract consisting of a bond three pages long (R. 297-299) and a mortgage securing it and referred to in it, sixteen pages long (R. 295-313), where the only question is one of the right of speculators who purchased paper they knew was in default to make a larger profit on the investment?

2. Whether a contract consisting of a bond, coupons attached and a mortgage, referring across to each other, which expressly authorized the owners of a "majority in amount" to control what should be done toward enforcing payment after a default in paying interest should "have continued six months," governed wholly by the local law of a State, has been properly construed by the District Court and Circuit Court of Appeals in succession?

3. Where action was expressly authorized by the contract consisting of a bond with attached coupons and a mortgage securing it, and Petitioners who sued at law to collect interest alleged to be due did not suggest any lack of "due process" down to and including their petition for rehearing in the Circuit Court of Appeals, whether they can obtain certiorari from this Court to enable them for the first time to raise that point on the construction of a private contract under the local law of a State.

REASONS FOR DENYING THE WRIT

1. The decision in *Manning v. Norfolk Southern R. R. Co.* (1887), 29 Fed. 838, only determined what was the "common law" in force in Virginia with regard to the action of bondholders, where the mortgage only gave the majority of bondholders power to instruct the trustees to waive a default, and the bondholders had adopted a resolution before any default had occurred to waive the payment of interest for the next five years; and there was no grant of authority or attempted exercise thereof, to "reorganize" because of continuing defaults affecting the investment as in the case at bar. It has no effect as against this construction by another Court of a different contract, under the laws of Indiana in force 55 years later.

> *Ruhlin v. New York Life Insurance Co.* (1938), 304 U. S. 202, 204-206, 82 L. Ed. 1290, 1291-1292.

2. So far from being "in conflict with the weight of authority governing mortgage provisions" such as this (as Petitioners say), none of the cases they cite hold that under such a bond and mortgage contract as we have here, where the majority of bondholders acted for the benefit of all after a default actually had occurred, their action was unlawful; but on the contrary, a long list of cases decided under the laws of jurisdictions other than Indiana have held that under the common law and the statutes there in force, such provisions of a contract in the bonds and mortgages, giving a majority in amount of the bondholders control of proceedings to enforce or adjust a claim after continuance of a default for six months, with full authority in the matter, are lawful and commendable.

Chicago, etc., Co. v. Fosdick, 106 U. S. 47, 27 L. Ed. 47;

Crossthwaite v. Moline Plow Co., 298 Fed. 466, 468;

Phipps v. Chicago, etc., Co., 284 Fed. 945, 953-4, 28 A. L. R. 1184, and note, page 202;

Cowell v. City Water Supply Co., 130 Iowa 671, 105 N. W. 1016;

Florida National Bank, etc. v. Life Ins. Co., 123 Fla. 525, 167 So. 378;

Moody v. Pacific, etc., Co., 174 Wash. 256, 24 Pac. (2d) 609;

Seibert v. Minneapolis, etc., Co., 52 Minn. 148, 43 N. W. 1134;

Sneath v. Valley Gold, 1 Ch. (Eng.) 477, 2 Rev. Rep. 292, 68 L. T. N. S. 602 C. A.

3. These Petitioners having all waited until in May, 1942, before bringing suit on interest coupons that had been continuously in default since October 1, 1936, are in no position to complain of the "fairness" of a provision written into a contract executed in 1902, consisting of a mortgage and the bonds and coupons it secured which gave the majority in amount of the bondholders power by a reorganization to effect a settlement of the debt after it should have become six months in default, where petitioners did not acquire their bonds until they were in default several times six months, and until they had depreciated in selling value in consequence. One's constitutional rights to due process of law are personal to himself and may be waived by maintaining a suit with relation to his rights for years and never suggesting that he has them till after affirmance of a judgment against him on appeal.

Jones v. Oklahoma City (C. C. A. 10), 78 F. (2d) 860, 861;
Booth Fisheries Co. v. Industrial Com. Wisconsin, 271 U. S. 208, 210, 70 L. Ed. 908, 910.

An answer setting up the provisions of this Mortgage and of the Bonds secured by it and referring to its provisions was filed in each of these cases, Gillmor, July 8 (R. 18); Abrams, July 15 (R. 276; Pyramid Com. Corp. August 12 (R. 348), all in 1942. The trial was October 30, 1942 (R. 57), the Special Finding was made February 26, 1943, the case on appeal to the Circuit Court of Appeals was argued May 14, 1943 and decided June 10 (R. 412, 413), and the Petitioners filed an application for a rehearing July 10, 1943 (R. 423), which was denied August 2, 1943 (R. 477), after they had filed a reply brief thereon July 23d, 1943 (R. 467).

And not until this Petition for Writ of Certiorari was filed October 30, 1943 was the subject of being deprived of the Due Process of Law mentioned.

Respondent The Indianapolis Gas Company respectfully insists that the petition should be denied.

LOUIS B. EWBANK,
Attorney for The Indianapolis
Gas Company

733 State Life Building
Indianapolis, Indiana